Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEE

CHRISTOPHER G. MACKARONIS
(Counsel of Record)
STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
AMERICAN ASSOCIATION OF
RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957
Attorneys for Amicus Curiae American Association of Retired Persons

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AN EMPLOYER CANNOT DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2) OF THE ADEA MERELY BY DEMONSTRATING THAT THE DISCRIMINATORY PROVISION PRE-DATED THE LAW	4
A. The Employer Bears The Burden Of Proof Under Section 4(f)(2)	4
B. Congress Has Overturned *United Air Lines, Inc. v. McMann*	6
II. IN DEFENDING A CLAIM OF BENEFITS DISCRIMINATION, ONLY AGE-RELATED COST CONSIDERATIONS CAN DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2)	13
A. The Legislative History Confirms The Limited Purpose Of Section 4(f)(2)	14
B. The Contemporaneous Administrative Interpretations of Section 4(f)(2) Requiring Proof Of Equal Benefits Or Equal Cost Have Been Specifically Endorsed By Congress	16
C. Following The 1978 Amendments, The Cost Requirement For Disproving "Subterfuge" Was Continued In Effect	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) .. 4

Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd on other grounds sub nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) 4

Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) 5, 16

Betts v. Hamilton County Board of Mental Retardation and Development Disabilities, 848 F.2d 692 (6th Cir. 1988) 13

Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 8, 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Cipriano v. Board of Education of North Tonawanda, 785 F.2d 51 (2d Cir. 1986) 5

Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 434 U.S. 99 (1977) 6

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 17, 21

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 5, 9, 14, 17

EEOC v. Cargill, Inc., 852 F.2d 682 (10th Cir. 1988) 11

EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988) 5, 6, 13

EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) 11

EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) 7

EEOC v. State of Maine, 823 F.2d 542 (1st Cir. 1987) 11

EEOC v. Westinghouse Electric Corp., 48 Fair. Empl. Prac. Cas. [BNA] 734 (3d Cir. 1988) 13

EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984) .. 5, 13, 14

TABLE OF AUTHORITIES—Continued

Page

General Electric Co. v. Gilbert, 429 U.S. 125 (1975) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 17

Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 2038 (1988) 5, 13

Lorillard v. Pons, 434 U.S. 575 (1978) 6

McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976) 7, 8, 12, 16

Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983) 11

Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299 (1932) 4

Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980) 7

Smart v. Porter Paint, 630 F.2d 490 (7th Cir. 1980) 7

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 17

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 4, 6

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) .... *passim*

United States v. Jackson, 280 U.S. 183 (1930) 17

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 12

Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 4, 10, 12, 17

Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978) 8

STATUTES

Age Discrimination in Employment Act of 1967, as amended, (ADEA), 29 U.S.C. § 621 *et seq.* 1

29 U.S.C. § 621(b) 2, 7

29 U.S.C. § 623(a) 2, 7

29 U.S.C. § 623(f)(1) 12

29 U.S.C. § 623(f)(2) .... *passim*

Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. § 1052(a)(1)(B) 16

TABLE OF AUTHORITIES—Continued

	Page
Ohio Revised Code § 145.32	16
Ohio Revised Code § 145.35	4
Ohio Revised Code § 145.35(b)	4
Pub. L. No. 93-259, 88 Stat. 74 (1974)	6
Pub. L. No. 95-256, 92 Stat. 189 (1978)	7, 21
Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979	16
Pub. L. No. 99-592, § 2(c), 100 Stat. 3342	2, 22
Reorganization Plan No. 1 of 1978, 92 Stat. 3781	3
LEGISLATIVE HISTORY	
113 Cong. Rec. 7076 (March 16, 1967), *reprinted in* Legislative History at 71	14
113 Cong. Rec. 7076-77 (March 16, 1967), *reprinted in* Legislative History at 71-72	10
113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146	15, 16
113 Cong. Rec. 34746 (December 4, 1967), *reprinted in* Legislative History at 157	15
123 Cong. Rec. 34295 (October 19, 1977), *reprinted in* Legislative History at 482	19
124 Cong. Rec. 7881 (March 21, 1978), *reprinted in* Legislative History at 528	10, 19, 20
124 Cong. Rec. 7886 (March 21, 1978), *reprinted in* Legislative History at 533	19
124 Cong. Rec. 7887 (March 21, 1978), *reprinted in* Legislative History at 534	19
124 Cong. Rec. 7888 (March 21, 1978), *reprinted in* Legislative History at 535	19
124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 538-39	10, 18
124 Cong. Rec. 8219 (March 23, 1978), *reprinted in* Legislative History at 539	20
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* Legislative History at 519	10, 12, 17, 18
H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986)	16
Hearings on S. 830 before the Subcommittee on Labor of The Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967)	14

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* Legislative History at 443 (1981)	8, 9, 12, 17, 18
S. Rep. No. 723, 90th Cong., 1st Sess. 14, *reprinted in* Legislative History at 118 (1967)	14, 15
REGULATIONS	
29 C.F.R. § 860.120 (1979)	20
29 C.F.R. § 860.120(a) (1969)	17
29 C.F.R. § 860.120(a) (1) (1979)	5, 20
29 C.F.R. § 860.120(f) (1) (iii) (1979)	21
29 C.F.R. § 860.120(f) (1) (iv) (A) (1979)	16
29 C.F.R. § 1625.10(a) (1) (1987)	5, 20
29 C.F.R. § 1625.10(d) (1987)	20
29 C.F.R. § 1625.10(f) (1) (iii) (1987)	21
34 Fed. Reg. 9709 (June 21, 1969)	17
44 Fed. Reg. 30,648 (May 25, 1979)	20, 21
52 Fed. Reg. 23,811 (June 25, 1987)	5, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a not-for-profit corporation of more than thirty million persons age fifty and older. AARP is the largest organization of its kind in America. In representing the interests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. More than eight million AARP members are actively employed, many of whom are participating in employee benefit plans and are covered by the provisions of the Age Discrimination in Employment Act of 1967, as amended, "ADEA," 29 U.S.C. § 621 *et seq.*

The issues in this case concern the circumstances in which an employer may use age as the sole criterion for eliminating valuable employee benefits. The legal issues presented could materially affect the terms and conditions of employment of millions of working Americans and could have a profound effect on the willingness of older persons to remain actively employed. Moreover, such limitations could be detrimental to thousands of older workers whom Congress sought to benefit by the recent elimination of mandatory retirement. *See* Pub. L. No. 99-592, § 2(c), 100 Stat. 3342. AARP has a substantial interest in the resolution of these issues, and for that reason submits this brief *amicus curiae*.[1]

SUMMARY OF ARGUMENT

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). Consistent with these purposes, the ADEA broadly prohibits discrimination based on age in virtually all terms and conditions of employment. 29 U.S.C. § 623(a). Through the enactment of § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), Congress fashioned an exception designed to permit limited discrimination in employee benefit plans. The purpose of § 4(f)(2) was to ensure that employee benefits were not *more* costly for older workers, a result which specifically would have frustrated one of the ADEA's principal objectives—the hiring of older workers.

Shortly after the passage of the ADEA, regulations issued by the enforcing agency[2] limited the scope of the

[1] AARP files this brief with the written consents of the parties, which have been filed with the Clerk of the Court.

[2] Administrative and enforcement authority over the ADEA resided with the Department of Labor from the date of the Act until July 1, 1979, at which time it was transferred to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 42 Fed. Reg. 19807.

§ 4(f)(2) exception to benefit reductions that were justified by age-related costs. This limitation effectively harmonized the dual purposes of the ADEA by ensuring that older workers would neither be more expensive to hire nor would they be subject to arbitrary age-based discrimination in employee benefits.

Relying on *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the Appellant Public Employees Retirement System of Ohio (hereafter "the State") argues that it need not provide any cost justification for the exclusion of workers age sixty and older from its disability plan simply because the discriminatory provision pre-dated the ADEA. Congress has, however, explicitly rejected the State's argument.

In amending § 4(f)(2) in 1978, Congress meticulously ensured that both the "reasoning and holding" of *McMann* had been overturned. In so doing, Congress specifically embraced the existing cost principles embodied in regulations interpreting § 4(f)(2), and made clear its intent that *all* employee benefit plans, including those that predated the ADEA, must demonstrate a cost justification for benefit reductions in order to satisfy the exception.

Subsequent to the 1978 amendments, more comprehensive regulations were issued at the behest of Congress. These regulations reiterated the longstanding cost interpretation of § 4(f)(2) and specifically prohibited the type of age-based denial challenged here.

Since the State did no more than point to the pre-Act origins of the challenged disability provision, it failed to meet its burden of proof under § 4(f)(2). In consequence, the decision below should be affirmed.

ARGUMENT

I. AN EMPLOYER CANNOT DISPROVE "SUTERFUGE" UNDER SECTION 4(f)(2) OF THE ADEA MERELY BY DEMONSTRATING THAT THE DISCRIMINATORY PROVISION PRE-DATED THE LAW.

A. The Employer Bears The Burden Of Proof Under Section 4(f)(2).

Appellee June M. Betts (hereafter "Betts") was denied both disability retirement benefits and the accompanying right to resume service solely because of her age.[3] In order to escape liability from this *per se* violation of the ADEA, the State was required to justify its conduct under one of the ADEA's narrow affirmative defenses. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985). Acknowledging the age-based exclusion, the State seeks refuge in the exception for bona fide employee benefit plans set forth in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2).[4]

In response to Betts' motion for summary judgment, it was the State's responsibility to come forward with evidence sufficient to demonstrate a triable issue of fact

[3] *See* Ohio Revised Code § 145.35 (exclusion of persons age 60 and older); Ohio Revised Code § 145.35(b) (right to resume service at same or "similar position and salary").

[4] The burden of proof under § 4(f)(2) rests with the party invoking the defense. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n.24 (1985). That burden is substantial since § 4(f)(2), as an exception to remedial social legislation, is to be narrowly construed. *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U.S. 299, 311-12 (1932); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); 29 C.F.R. § 860.120(a)(1) (1979). Accordingly, the employer must show that the challenged practice "plainly and unmistakably" meets the "terms and spirit" of the remedial legislation that the ADEA represents. *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 954 (2d Cir. 1983), *aff'd in part, rev'd on other grounds, sub. nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

regarding the § 4(f)(2) defense, *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), an issue upon which the State would have the burden of proof at trial. There is unanimity among the Courts of Appeals that in order to establish the § 4(f)(2) defense, an employer must prove that the challenged action was taken (1) in observance of the terms of (2) a bona fide employee benefit plan which (3) is not a subterfuge to evade the purposes of the ADEA.[5]

Consistent with the language of § 4(f)(2),[6] both the courts and administrative regulations have limited the defense to employee benefit plans in which the cost of the challenged benefit bears some discernible relationship to the employee's age. 29 C.F.R. § 860.120(a)(1), *recodified* at 29 C.F.R. § 1625.10(a)(1); 52 Fed. Reg. 23,811 (June 25, 1987).[7] While disability plans, generically,

[5] *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 2038 (1988); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988); *Cipriano v. Board of Education of Education of North Tonawanda*, 785 F.2d 51, 57 (2d Cir. 1986); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982).

[6] The language of § 4(f)(2) qualifies the term "bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan." In interpreting this language, three Courts of Appeals have ruled "that Congress meant to exempt only certain benefit schemes from the antidiscriminatory provisions of the Act." *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *see also EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984); *Alford v. City of Lubbock*, 664, F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982).

[7] Thus, for example, neither uninsured sick leave plans, *Alford v. City of Lubbock*, 664 F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982), nor severance payments based on years of service, *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984), are "bona fide employee benefit plans" within the meaning of § 4(f)(2). *See also* 29 C.F.R. § 1625.10(a).

appear to be the type of plans intended to fall within the defense because they involve age-related cost considerations, *see EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988), the State's failure to show the incorporation of any age-related cost factors in its plan constitutes a failure of proof that the plan is a "bona fide plan" within the meaning of § 4(f)(2).

B. Congress Has Overturned *United Air Lines, Inc. v. McMann.*

Beyond the "bona fide plan" hurdle, the employer must prove that reducing or denying a benefit based on age is not a "subterfuge." The State argues that it met this burden by demonstrating that the provision excluding all employees age 60 and older pre-dated the ADEA. The State argues, in effect, that in passing the ADEA in 1967, Congress intended to perpetuate, *ad infinitum*, all age-based benefits discrimination then in effect.[8]

This implausible result is wholly unsupported either in the statute or its legislative history. With the passage of the ADEA, Congress "broadly prohibit[ed] arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985), *quoting Lorillard v. Pons*, 434 U.S. 575, 577 (1978). *See also Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 434 U.S. 99 (1977) ("the ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment"). The State's argument contravenes the broad remedial pur-

[8] The State's rationale, if correct, would apply to both public and private employee benefit plans, exempting private plans enacted prior to 1967, the date of passage of the ADEA, and exempting all state and local plans enacted prior to 1974, when Congress extended the ADEA to cover those entities. *See* Pub. L. No. 93-259, 88 Stat. 74 (1974).

poses of the ADEA to prohibit "arbitrary age discrimination" (§ 2(b), 29 U.S.C. § 621(b)) in "terms, conditions, or privileges of employment. 29 U.S.C. § 623(a)(1). Moreover, it has been specifically rejected by Congress.

Relying exclusively on this Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the State argues that a pre-Act plan, by virtue of its date of origin, cannot be a subterfuge within the meaning of § 4(f)(2). State's Br. at 16-21.[9]

The amendment of § 4(f)(2), Pub. L. No. 95-256, 92 Stat. 189 (1978), overruling *McMann* and the amendment's legislative history demonstrate, however, that the State errs by relying upon *McMann* as authoritative support for that proposition. The history of the 1978 amend-

[9] By arguing that pre-Act plans are *per se* "not a subterfuge," the State argues in essence that Congress intended to sanction all age-based distinctions in pre-Act plans, no matter how arbitrary or invidious. However, the *maintenance* as well as the institution of a plan can evidence the intent necessary to demonstrate that the plan is a subterfuge to evade the purposes of the Act. *See United Air Lines, Inc. v. McMann*, 434 U.S. at 219 n.13 (Marshall, J., dissenting); *McMann v. United Air Lines, Inc.*, 542 F.2d 217, 221 (4th Cir. 1976) ("the legislative history [of the original ADEA] makes it clear that . . . [t]o avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act." (emphasis added).

Focusing upon the institution of a plan, as appellant urges, is particularly inappropriate in this case. As Betts explains in her brief, there have been significant amendments to the disability plan at issue here since 1974, when the ADEA was extended to state and local governments. Indeed, the addition of a thirty percent minimum disability benefit in 1976 has exacerbated the adverse effect of the disability exclusion upon older workers, and must be independently justified. *See EEOC v. Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982); *Smart v. Porter Paint*, 630 F.2d 490 (7th Cir. 1980). *Cf. Sikora v. American Can Co.*, 622 F.2d 1116, 1124 (3d Cir. 1980) (alterations made after ADEA passage may be examined to see if changes were designed to evade the purposes of the Act).

ment to § 4(f)(2) clearly indicates that Congress intended to overrule *McMann's* specific holding that involuntary retirement pursuant to a pre-Act plan was permissible, and its more general conclusion that an employer could demonstrate compliance with the "not a subterfuge" language of § 4(f)(2) by pointing to the pre-Act origins of a benefit plan.

In 1977, when Congress was considering amendments to the ADEA, the courts of appeal were in disagreement as to whether the "bona fide" and "subterfuge" language contained in § 4(f)(2) permitted mandatory retirement before age 65 pursuant to the terms of a retirement plan. In *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), and *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), the Third and Fifth Circuits ruled that the language of the exception permitted involuntary retirement. Specifically, the Fifth Circuit in *Taft Broadcasting* held that a retirement plan "effectuated far in advance of the enactment of the law" could not be a subterfuge for evasion of the Act or its purposes. 500 F.2d at 215. In contrast, the Fourth Circuit, in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), ruled that a forced retirement pursuant to a pre-Act plan would be considered a "subterfuge" to evade the purposes of the Act absent an employer's showing of a legitimate business purpose for the age-based action. *Id.* at 220.

The Senate Report issued in 1977 accompanying the bill to amend § 4(f)(2) (H.R. 5383) noted this conflict among the courts of appeals in interpreting the section and stated its "approval of the result reached by the Fourth Circuit in *McMann*." S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* EEOC Legislative History of the Age Discrimination in Employment Act of 1967 at 443 (1981) (hereafter "Legislative History"). Specifically rejecting the legal proposition upon which the State relies here, the Report stated:

> The *Tart* (sic) court found the language of the section [4(f)(2)] unambiguous and refused to consider the legislative history. *It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of section 4(f)(2) if it was operative before the effective date of the act.*

S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* Legislative History at 443 (emphasis added).

Prior to the passage of the amendment, this Court reversed the decision of the Fourth Circuit in *McMann*. This Court held that under § 4(f)(2), a bona fide[10] retirement plan could lawfully impose mandatory retirement. That holding was premised on this Court's reasoning that a plan could not constitute a subterfuge—that is, "a scheme, plan, strategem or artifice"—to evade the Act or its purposes if the plan pre-dated the Act.

Within a matter of months,[11] Congress "overruled"[12] the *McMann* decision by passing an amendment to § 4(f)(2) which states "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [covered by the Act]." The House and Senate Conference Committee Report explaining the amendment makes clear that the "subterfuge" clause was never intended to provide a blanket exception for all pre-existing employee benefit plans. The Report explains:

---

[10] The Court noted that the plan at issue there was conceded by the parties to be "bona fide 'in the sense that it exists and pays benefits' ", *McMann*, 434 U.S. at 194 and n.2, and the Court therefore undertook no independent inquiry as to the meaning of "bona fide."

[11] In his dissent in *McMann*, Justice Marshall cautioned that the effect of *McMann* would "be short lived," 434 U.S. at 218, recognizing that the Senate and House had passed amendments to overturn the majority's decision.

[12] *EEOC v. Borden's, Inc.*, 724 F.2d at 1395 n.4.

> In *McMann v. United Airlines*, 98 S. Ct. 24 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). *The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fat they antedate the act or these amendments.*

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* Legislative History at 519 (emphasis added); *see* remarks of Senator Javits ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that case.'") (emphasis added) 124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 538-39; remarks of Representative Hawkins (the "conferees specifically disagree with the Supreme Court's . . . reasoning . . . particularly its conclusion that *an employee benefit plan* which discriminates on the basis of age *is protected by section 4(f)(2) because it pre-dates the enactment of the ADEA.*") (emphasis added) 124 Cong. Re. 7881 (March 21, 1978), *reprinted in* Legislative Histoy at 528.[13]

---

[13] During consideration of the 1978 amendments, Senator Javis, "an active proponent of [ADEA] legislation" in both 1967 ad 1978, *see Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 46 n.22 (1985), stated that the *dissent* in *McMann* correctly interpreted § 4(f)(2). 124 Cong. Rec. 8218 (March 23, 1978), *reprinid in* Legislative History at 539. Justice Marshall, in the dissent o which Senator Javits referred, stated his "emphatic disagreemat with [the majority and Justice Stewart's] suggestion that a pe-Act plan cannot be a subterfuge to avoid the purposes of the Ac" 434 U.S. at 218 n.13. Senator Javits's comments regarding § 4(f)() are particularly instructive, since in 1967 he introduced the amendment to the administration bill which became the final versiom f § 4(f)(2). 113 Cong. Rec. 7076-77 (March 16, 1967), *reprinted n* Legislative History at 71-72.

In circumstances similar to these, this Court has held that both the premise and holding of a decision "overruled" by Congress are invalid. In *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983), this Court construed the Pregnancy Discrimination Act of 1978. That Act was passed for the express purpose of overturning the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1975), which interpreted the anti-discrimination provisions in Title VII of the Civil Rights Act of 1964. In *Newport News*, this Court rejected the argument that Congress intended only to overrule *Gilbert's* result, an interpretation which would have limited Congress's action to prohibiting discrimination against female employees. Instead, since "Congress . . . *unambiguously expressed its disapproval of both the holding and the reasoning of the court in the Gilbert decision*," 462 U.S. at 678 (emphasis added), this Court concluded that the "premises" of *Gilbert* were overturned,[14] 462 U.S. at 685, and that the amendment was intended to also proscribe discrimination against male employees. *Compare Newport News*, 462 U.S. at 678, with 462 U.S. at 693-95 (Rehnquist, J., dissenting).

Nevertheless, that State argues that the explicit legislative history regarding § 4(f)(2) should be ignored. On the contrary, it is clear that the 1978 legislative history of § 4(f)(2) is germane in resolving the meaning of "subterfuge." The cornerstone of this Court's reasoning in *McMann* and of its disagreement with the Fourth Circuit was the premise that § 4(f)(2) requires no showing of business purpose for age-based policies contained in pre-Act plans. *See McMann*, 434 U.S. at 198, 203. The

---

[14] The reasoning of *Newport News* similarly repudiates the circuit court decisions that rely on the reasoning of *McMann* as valid while recognizing that *McMann's* holding has been legislatively overruled. *See EEOC v. Cargill, Inc.*, 852 F.2d 682 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. State of Maine*, 823 F.2d 542 (1st Cir. 1987).

conferees' unambiguous statement that *McMann's* "reasoning" was erroneous establishes that Congress disagreed not only with *McMann's* holding regarding forced retirement, but also with the Court's subterfuge analysis on which the holding was predicated.

Indeed, the State's argument that the 1978 legislative history can be discarded because the term "subterfuge" was not actually amended (State's Br. at 17-18) conflicts with the analysis of this Court in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). In *Criswell*, this Court considered another ADEA exception, the "bona fide occupational qualification" ("BFOQ") defense contained in § 4(f)(1) of the Act, 29 U.S.C. § 623(f)(1). Even though § 4(f)(1) was not amended in 1978, a unanimous Court relied heavily upon the legislative history of the 1978 amendments in arriving at the appropriate standard governing § 4(f)(1). The Court concluded that "Congress, in considering the 1978 Amendments, implicitly endorsed the two-part inquiry [for a BFOQ] identified by the Fifth Circuit" in its decision in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). 472 U.S. at 415.

In *Criswell*, evidence of congressional "endorsement" of the *Tamiami* standard was found in the Senate Report, S. Rep. No. 493, 95th Cong., 1st Sess. 10-11, *reprinted in* Legislative History at 443-44, and in the Conference Report, H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, *reprinted in* Legislative History at 518. *Criswell*, 472 U.S. at 415. These same sources of legislative history relied upon by this Court in *Criswell* establish Betts' position here: that Congress refuted the "reasoning" of the Fifth Circuit in *Taft Broadcasting Co.* and of the Supreme Court in *McMann*, and that it endorsed the decision of the Fourth Circuit in *McMann*, which held that all employee benefit plans, regardless of their date of origin, must demonstrate a legitimate business purpose to satisfy the "subterfuge" standard of § 4(f)(2).

II. IN DEFENDING A CLAIM OF BENEFITS DISCRIMINATION, ONLY AGE-RELATED COST CONSIDERATIONS CAN DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2).

In its decision below, the Sixth Circuit held that the denial of disability benefits to Betts violated the ADEA in light of the State's "failure to introduce any cost figures or other economic justification for the different treatment of employees over sixty." *Betts v. Hamilton County Board of Mental Retardation and Development Disabilities*, 848 F.2d 692 (6th Cir. 1988).

Like the court below, other courts of appeals have required proof of a cost justification when employee benefits have been reduced or eliminated based on age.[15] In defending an age-based benefit denial, as here, an employer can disprove "subterfuge" only by demonstrating that equal benefits are provided or that equal cost for benefits is incurred.[16]

---

[15] *EEOC v. Westinghouse Electric Corp.*, 48 Fair Empl. Prac. Cas. [BNA] 734 (3d Cir. 1988), ("Westinghouse II") (severance payments denied to employees electing pension benefits); *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (reduction in payment of accumulated sick leave, denial of health insurance); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988) (denial of disability benefits at age 60); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (denial of severance pay for pension-eligible employees age 55 and over).

[16] Contrary to the State's suggestion, it is not a "difficult task" to reconcile the cost standard utilized by the enforcement agency and the courts with the definition of "subterfuge" set forth in *McMann*. (State's Br. at 24 n.12). This Court's general definition of "subterfuge" as a "scheme, plan, stratagem or artifice" was developed in the context of involuntary retirement, a practice which Congress has since made clear was never permissible under § 4(f)(2). In the context of a benefit reduction (or cessation), the only type of practice to which the § 4(f)(2) exception applies, Congress, the enforcement agencies and the courts have uniformly declared that a benefit reduction which *is not* cost justified is, in effect, a "subterfuge," *i.e.*, a "scheme, plan, stratagem or artifice of evasion."

The legislative history of § 4(f)(2), as well as the contemporaneous and longstanding administrative interpretations of that section, confirm the quantifiable standards by which the court below addressed the "subterfuge" issue. The legislative history demonstrates that Congress wished to provide employers with the flexibility to make only those differentiations in benefit levels necessitated by age-related costs. *See EEOC v. Borden's, Inc.*, 724 F.2d at 1396; *EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 224-25.

A. The Legislative History Confirms The Limited Purpose Of Section 4(f)(2).

During consideration of the ADEA in 1967, Congress acknowledged that the cost of providing certain benefits to newly-hired older workers can be higher than providing the same benefits to younger workers. Senator Javits proposed the amendment which became § 4(f)(2) [17] in order to provide employers with the "flexibility" to make necessary distinctions based on age and thereby to ensure that employers would not be "discouraged from hiring older workers because of the increased costs associated with providing benefits to them." S. Rep. No. 723, 90th Cong., 1st Sess. 14, *reprinted in* Legislative History at 118; *Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967); *see also EEOC v. Borden's, Inc.*, 724 F.2d at 1396.[18] Senator Javits explained:

[17] 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in* Legislative History at 71.

[18] The State argues, in effect, that in order to encourage the hiring of older workers, Congress enacted a compromise in the form of § 4(f)(2) which "exempt[ed] from the Act's coverage the full panoply of employee benefit plans that otherwise might have discouraged employers from becoming full partners in the effort to eliminate arbitrary age discrimination." State's Br. at 39. The State's reading of the purposes of § 4(f)(2) goes too far. In order to eliminate any disincentives to hire older workers, Congress needed only to ensure that they were of comparable expense to younger workers. Congress did not, as the State suggests, create a two-tiered system of protection in which older workers were "cheap" labor entitled to few, if any, of the Act's protections.

> The meaning of this [§ 4(f)(2)] provision is as follows: An employer will not be compelled under this section to afford to older workers *exactly the same* pension, retirement, or insurance benefits as he affords to younger workers.

113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146 (emphasis supplied).[19] Thus, the intent of Congress in enacting § 4(f)(2) was to ensure that employers need not provide "exactly the same benefits" when to do so would result in the type of undue expense that could discourage the hiring of older workers.[20]

[19] *See also* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967) ("This exception serves to emphasize the primary purpose of the bill—hiring of older workers—without necessarily including such workers in employee benefit plans."); remarks of Senator Yarborough (amendment will not deny older workers employment but will "limit [their] rights to obtain *full* consideration" in benefit plans) 113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146 (emphasis supplied); remarks of Representative Daniels (§ 4(f)(2) "is designed to maximize employment possibilities *without working an undue hardship on employers in providing special and costly benefits.*") 113 Cong. Rec. 34746 (December 4, 1967), *reprinted in* Legislative History at 157 (emphasis added).

[20] Contrary to the State's argument (State's Br. at 36-37), statements in the 1967 legislative history indicating that some exclusions of older workers could be permissible under the Act are not applicable here for two simple reasons. First, the discussions concerning exclusions uniformly pertained to plans which excluded employees from participation at the date of hire, not to plans like the one challenged here, which exclude *all employees based on age*, regardless of service. There is not a shred of legislative history showing that Congress intended to permit employers to deprive long-service employees of benefits upon the attainment of an arbitrary age.

Second, mention in 1967 of exclusions from an employee benefit plan clearly pertained to pension plans. Indeed, those references

B. The Contemporaneous Administrative Interpretations of Section 4(f)(2) Requiring Proof Of Equal Benefits Or Equal Cost Have Been Specifically Endorsed By Congress.

Shortly after passage of the Act, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted the "subterfuge" provision of § 4(f)(2) as implementing a congressional intent that age-based differences in employee benefits be permitted where justified by valid cost considerations. This 1969 interpretation articulated an "equal benefit or equal cost" principle as follows:

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. § 860.120(a), 34 Fed. Reg. 9709 (June 21, 1969). *See EEOC v. Borden's, Inc.*, 724 F.2d at 1396. As a contemporaneous construction of the statute by the enforcement agency, the "equal benefit or equal cost" principle is entitled to great deference by the courts. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. Jackson*, 280 U.S. 183, 196-97 (1930).

In passing the 1978 amendments to the ADEA, Congress dispelled any doubt about whether the "equal benefit or equal cost" requirement for disproving "subterfuge" was consistent with Congress' original intent in enacting § 4(f)(2). The Senate Report accompanying the 1978 amendments (the first amendments to § 4(f)(2) since passage of the Act) implicitly embraced the existing interpretations of § 4(f)(2) by declaring:

> This bill would not alter existing law with respect to these practices. *Existing principles of law*, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, *would be the standard by which these practices will be evaluated.*

S. Rep. No. 493, 95th Cong., 1st Sess. 5, *reprinted in* Legislative History at 438 (emphasis added). Since this Court in *Criswell* relied on a virtually identical statement as congressional "endorsement" of the *Tamiami* standards under the BFOQ exception, 472 U.S. at 415, it is likewise clear that Congress "endorsed" the long-standing method of disproving "subterfuge." *Compare* H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, *re-*

---

manifest congressional intent not to force employers to include in a *pension plan* newly hired older workers who could not possibly meet the vesting requirements of those plans and whose inclusion would unduly disrupt the actuarial and cost expectations under which the plans operated. Comments of Senator Yarborough, 113 Cong. Rec. 31255 (1967), *reprinted in* Legislative History at 146; *see also Alford v. City of Lubbock*, 604 F.2d 1263, 1270 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *cf. McMann v. United Air Lines, Inc.*, 542 F.2d at 221.

Furthermore, the exclusions referred to in the 1967 legislative history were later narrowly drawn by the employee Retirement Income Security Act of -974 ("ERISA"), 29 U.S.C. § 1052(a)(1)(B) (employees can only be excluded from defined benefit pension plans, and then only if hired within five years of the normal retirement age in the plan). The limited exclusions in ERISA were adopted by regulation to apply to all employers covered by the ADEA, 29 C.F.R. § 860.120(f)(1)(iv)(A) (1979), and are included in the Ohio statutes at Ohio Revised Code § 145.32 (all employees, regardless of age at hire, must have five years of service to be eligible for retirement benefits). In 1986, Congress amended the ADEA and ERISA to prohibit, *inter alia*, the exclusion of any employee from any pension plan based on age at date of hire. *See* Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979 and H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986) (overall objectives of these amendments is to assure that employee benefit plans do not discriminate on the basis of age).

printed in Legislative History at 518 ("the amendment neither added to nor worked any change upon present law") *with* S. Rep. No. 493, 95th Cong., 1st Sess. 5, *reprinted in* Legislative History at 438 ("Existing principles of law . . . would be the standard by which these practices will be evaluated").[21]

Moreover, the existing principles under § 4(f)(2) were repeatedly, and specifically, recited by managers of the amendments and other members of Congress as the appropriate view of the law. Senate Javits, while addressing the proposed amendment of § 4(f)(2), repeated the existing interpretation almost verbatim:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. *Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*

124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 539 (emphasis supplied); *see* remarks of Senator Williams, Majority Manager of ADEA amendments, ("[Javits] statements are consistent with the position taken by the Department of Labor regarding these matters.") *Id. See also* remarks of Senator

[21] The State's implausible suggestion regarding the meaning of this portion of the legislative history is that it constituted an adoption of the legal standards set forth in *Taft Broadcasting*, the very decision Congress intended to overturn by passing the 1978 amendments. *See* State's Br. at 45.

Williams ("Section 4(f)(2) was intended to permit . . . varying coverage of workers in different age groups to reflect those [cost] differences so long as they are based on valid assumptions. . . .") 123 Cong. Rec. 34295 (October 19, 1977), *reprinted in* Legislative History at 482.

The statements of managers and other legislators from the House confirmed that § 4(f)(2) authorizes only reductions in benefits necessitated by costs. Remarks of Rep. Hawkins ("the purpose of section 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher.") 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in* Legislative History at 528. Furthermore, they noted that the exception does not authorize precisely the type of total cut off of benefits challenged here. Remarks of Rep. Wiess ("it is not the intention of this amendment to have older workers cut off from their health and benefit plans the day they reach age 65 . . . [employers] should not interpret the 1977 (sic) amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees.") 124 Cong. Rec. 7887 (March 21, 1978), *reprinted in* Legislative History at 534.[22]

C. Following The 1978 Amendments, The Cost Requirement For Disproving "Subterfuge" Was Continued In Effect.

After the passage of the 1978 amendments, the Department of Labor, in response to congressional requests

[22] *See also* Remarks of Rep. Waxman ("In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act.") 124 Cong. Rec. 7888 (March 21, 1978), *reprinted in* Legislative History at 535; remarks of Rep. Pepper, 124 Cong. Rec. 7886 (March 21, 1978), *reprinted in* Legislative History at 533.

for more comprehensive guidance regarding § 4(f)(2),[23] issued an amendment to its Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. § 860.120, 44 Fed. Reg. 30,648 (May 25, 1979).[24] It provided:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations . . . . Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. § 860.120(a)(1) (1979), *recodified at* 29 C.F.R. § 1625.10(a)(1). In accord with this interpretation, the regulations provide that an employer can demonstrate that a plan provision is "not a subterfuge" and is consistent with the Act's purpose, by showing that "the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. § 1625.10(d). Thus, the 1979 interpretations of the meaning of subterfuge continued in effect the cost principle consistently enunciated by the enforcing agency and previously endorsed by

---

[23] *See* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978); remarks of Senators Williams and Javits, ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans, and the Secretary is urged to act as soon as possible.") 124 Cong. Rec. 8219 (March 23, 1978), *reprinted in* Legislative History at 539.

[24] These regulations have since been recodified by the EEOC at 29 C.F.R. § 1625.10. *See* 52 Fed. Reg. 23,811 (June 25, 1987).

Congress. As a longstanding, consistent interpretation of § 4(f)(2), the interpretation is entitled to special deference. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 (1981).

In addition to reiterating the standard for disproving subterfuge in a benefits case, the interpretation explicitly applied the cost standard to disability benefits. 29 C.F.R. § 860.120(f)(1)(iii) (1979).[25] The interpretations emphasized that an employer may only reduce disability benefits based on age to the extent required by the increased cost of providing the benefit to older workers. *Id.* Moreover, the interpretations specifically state that a total cut off of disability benefits based on age is not permissible under the Act. *Id.* This interpretation remains in effect today. 29 C.F.R. § 1625.10(f)(1)(iii).

CONCLUSION

In 1978, Congress specifically rejected the sole argument upon which the State attempts to justify its arbitrary exclusion of employees age 60 and older from receiving disability benefits. For twenty years, the consistent interpretation of § 4(f)(2) by the enforcing agency has required proof of age-related cost considerations in order to prove that a benefit reduction or elimination is not a "scheme, plan, stratagem or artifice" to evade the ADEA. Contrary to the State's argument, the regulations help to eliminate arbitrary discrimination while at the same time facilitating the hiring of older

---

[25] The purpose of the 1979 interpretations was to provide guidance to employers who were required to extend the privileges and benefits of employment to workers age 65 to 70 who became protected as a result of the 1978 amendments to the ADEA. *See* Pub. L. No. 95-256, § 12(a), 92 Stat. 189; 44 Fed. Reg. 30,648 (May 25, 1979). The State argues, illogically, that Congress endorsed discrimination against employees age 60 and older who were already protected by the ADEA—while extending the Act's protections to employees age 65 to 70.

persons. The continued harmonization of these two objectives, as embodied in the regulations and adopted by the courts, is especially important in light of the elimination of mandatory retirement for virtually all workers in both the private and federal sector. *See* Pub. L. No. 99-592, § 2(c), 100 Stat. 3342. For all these reasons, AARP respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

CHRISTOPHER G. MACKARONIS
(Counsel of Record)
STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
AMERICAN ASSOCIATION OF
RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957
Attorneys for Amicus Curiae
American Association of
Retired Persons

Dated: January 31, 1989